

Nadler Issues Robust Defense of Health Care Reform and its Minimum Coverage Requirements

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WASHINGTON, D.C. - Today, Congressman Jerrold Nadler (D-NY), the ranking Democrat on the House Judiciary Subcommittee on the Constitution, and one of Congress's foremost experts on the United States Constitution, offered a full-throated defense of the constitutionality of the Affordable Care Act and its minimum coverage requirement at a Judiciary Committee hearing on the "Constitutionality of the Individual Mandate."

"It is an unfortunate fact that the vast majority of uninsured Americans are unable to cover the costs of their health care," said Nadler. "As a result, other Americans shoulder those costs through taxes and increased fees for health care and insurance premiums. That Congress provided a clear incentive for all of us to carry our share of the health care costs we inevitably incur - by requiring everyone to obtain a minimum level of health insurance coverage or pay a penalty - is neither overly intrusive of personal liberty nor beyond our legislative authority. Indeed, none of us should claim the right - much less claim a constitutional right - to shift the costs of our care on to other participants. What is truly at issue here is simply a requirement that each of us takes steps to ensure that we are able to pay for the health care that we inevitably will need."

Nadler submitted the following statement:

"Today we consider whether the minimum coverage requirement in the Affordable Care Act - a provision requiring the purchase of insurance or the payment of a penalty - is constitutional.

"We have been treated to some really novel theories about Congress' powers under the Constitution, especially within the scope of the Commerce clause. Among those is the claim that the law regulates 'inactivity,' by requiring those who might not wish to purchase insurance to do so or to pay a penalty. But whether one chooses to purchase insurance or not, they are an active participant in the health care market. After all, no one can credibly claim that they will not get ill or injured and need care. And the notion that, simply by failing to purchase insurance now, one becomes 'inactive' in the health care market that we are regulating is complete and utter fiction.

"It is an unfortunate fact, as well, that the vast majority of uninsured Americans - more than 90% of the long-term uninsured - are unable to cover the costs of their health care. As a result, other Americans shoulder those costs through taxes and increased fees for health care and insurance premiums. That Congress provided a clear incentive for all of us to carry our share of the health care costs we inevitably incur - by requiring everyone to obtain a minimum level of health insurance coverage or pay a penalty - is neither overly intrusive of personal liberty nor beyond our legislative authority.

"Indeed, none of us, as necessary participants in the health care market, should claim the right - much less claim a constitutional right - to shift the costs of our care on to other participants.

"Yet this is what critics of the law are seeking.

"And while the arguments they marshal to attack the Affordable Care Act might have found support in the law at the turn of the 20th Century or before, we have long turned the page on those chapters in our history. And we are a better nation for it.

"What, after all, is the grave individual liberty right at stake that warrants doomsday predictions about the end of all liberties? Critics of the law speak of a broad right to be free from government regulation of 'inactivity.' They dwell upon hypothetical after hypothetical - the forced eating of leafy greens or mandatory exercise - but they decidedly avoid talking about is what is truly at issue here - which is simply a requirement that each of us takes steps to ensure that we are able to pay for the health care that we inevitably will need.

"Many - indeed most - Americans already do this. For these many Americans, the minimum coverage requirement under attack in today's hearing ensures the right to insurance coverage, regardless of pre-existing conditions. It also means that the cost of their health care and insurance premiums will go down, as the costs they now must shoulder to cover the uninsured are reduced.

"We have not heard much about the consequences for these Americans in the heated debate about the constitutionality of the Affordable Care Act.

"We have, however, heard much about the alleged right of those who might rather 'be let alone' - individuals who, though they can afford it and have no religious objection, would rather not purchase insurance or pay a penalty. Maybe these individuals believe they have enough money to pay out-of-pocket as the need arises; maybe they plan on shifting the cost of their care to others. But do they have a constitutionally protected liberty right to do so?

"Given the dire proclamations about the impact that the individual minimum coverage requirement will have on individual liberty, one would certainly think that such a right exists. But not a single judge in any of the cases challenging the constitutionality of the minimum coverage requirement has recognized its existence. The reason is simple. The view, held for a brief period of time dating from the Supreme Court's 1905 decision in *Lochner v. New York* to the mid-1930s, that the Constitution protects individual economic liberties or rights against government laws that require, or prohibit, action has long since been discarded.

"Indeed, states currently require citizens to purchase insurance. Congress, through the Medicare program, requires citizens to pay for health coverage they will receive after age 65. These laws violate no cognizable individual liberty interest; nor does the Affordable Care Act.

"The courts considering challenges to the minimum coverage requirement know this. So do our witnesses here. While they may speak heatedly of individual liberty, none of them fashions his argument as a substantive due process claim but, instead, argues that we have acted beyond our enumerated powers, indicating in vague and unspecified ways that there is a state interest that is being trampled as well.

"But here's the problem for them. Unless the Constitution protects the individual liberty right to, as they describe it, remain 'inactive' by refusing to purchase insurance, they cannot prevail.

"The 1819 decision in *McCulloch v. Maryland*, which unlike *Lochner* remains good law and is invoked frequently by our current Supreme Court justices - including Justice Scalia in his recent opinion in *Gonzales v. Raich*, makes this perfectly clear. In the opinion that has defined the nature and scope of federal authority and its relationship to the states, Chief Justice Marshall said:

'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are

constitutional.'

"Our 'end' here - achieving affordable and available health care for all through regulation of the vast interstate health care market to lower costs by making free-riders pay their fair share - is unquestionably legitimate. The minimum coverage requirement is appropriate, and is not prohibited by the Constitution. The law is, therefore, fully constitutional."

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